Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1887

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

POINT I

The relief granted by the courts below is both inequitable and in violation of the Eleventh Amendment.

Respondent asserts that the judgment below does not violate the Eleventh Amendment of the United States Constitution because the benefits to be restored run forward in time from the date of judgment, and because restoration of benefits is a proper remedy of past statutory and regulatory violations. (Br. in opp. pp. 7-9).

As discussed at pp. 14 and 19 of the Petition for Certiorari, neither *Edelman* v. *Jordan,* 415 U.S. 662 (1974)

nor *Quern* v. *Jordan*, 440 U.S. 332 (1979) lends support to respondent's argument that the "linchpin" of Eleventh Amendment analysis is whether the relief runs forward from the date of judgment, and that benefits which run forward are *ipso facto* not retroactive. Respondent's reliance on *Milliken* v. *Bradley*, 433 U.S. 267 (1977) is similarly misplaced.

Milliken, a unique case with consequently limited precedential effect, *id.* at 296 (Powell, J. concurring), involved the imposition of remedies to eliminate the presence and effects of *de jure* segregation in Detroit. The lower court had determined that certain educational programs were necessary to remedy the effects of the segregation, and the State of Michigan not only did not object to such programs, it in fact consented to the most expensive one. *Ibid.* However, the lower court had also ordered that the State pay half the costs of the programs, because the Detroit Board of Education was faced with critical financial problems and would not be able to finance the programs without the additional state funds. *Bradley* v. *Milliken*, 540 F. 2d 229, 245-6 (6th Cir. 1976); *see Milliken* v. *Bradley*, *supra*, at 296 n.3 *(Powell,* J. concurring). Thus, the expenditure of state funds was a "necessary consequence" *(Edelman* v. *Jordan*, *supra*, at 668) of the *Ex parte Young*-type injunction requiring the programs' implementation.

Moreover, the steps which a state official must take to conform his conduct to federal law when *de jure* segregation has been found are very different from the steps a state official must take to conform his conduct to federal law when an inconsistency between state law and the Social Security Act has been found. Because of the nature of school segregation, remedial programs are necessary to ensure that the current needs of the victims of that past violation of federal rights will be met. *Milliken* v.

Bradley, supra, at 290. On the other hand, the payment of benefits required in the instant case is based solely on the fact of a past violation of the Social Security Act, i.e., the termination of benefits without certain procedural safeguards. Such payments will not be made to remedy current needs caused by that past violation; the existence of such needs was not determined by the lower courts and will not be determined by petitioner until *after* the payments are commenced. (22a).* The payments are thus purely in compensation for the past past violation. *Quern* v. *Jordan, supra,* at 666n.11, and an order directing that such compensatory payments be made is barred by the Eleventh Amendment. *Id.* at 337-8 n.6.

Respondent's assertion that restoration of benefits is a proper remedy to correct the past violation of procedural safeguards required before termination of medicaid benefits is also incorrect. As discussed in *Perry* v. *Sinderman,* 408 U.S. 593 (1972), when an individual has a property interest and is entitled to due process protections prior to the termination of that interest, the fact that the State has terminated the interest without such protections does not give rise to a right of reinstatment. The judicial remedy is to require use of the procedural safeguards, *after* which the property interest may be reinstated, if found appropriate.

Respondent also contends that the relief ordered is not inequitable because the District Court accommodated petitioner's request for certain procedures which would lighten her administrative burden (Br. in Opp. pp. 13-14, 4-5). (Petitioner did not consent to the restoration requirement, which was contained in the District Court Opinion [22a]. The procedures were requested during settlement of the judgment implementing that requirement.) However, as

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* Numbers followed by "a" refer to pages in the appendix to the petition.

explained at pp. 10-11 of the petition, it is the fact of the restoration itself which presents the inequitable burden, a burden which cannot be significantly alleviated even by the most accommodating District Court Judge.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
September 2, 1980

Respectfully submitted,

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